86-412

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE COPLEY PRESS, INC.,
THE STATE JOURNAL-REGISTER,
JIM TINEN, STEVE SLACK,
JOHN P. CLARKE, EDWARD H. ARMSTRONG,
and PATRICK COBURN, Petitioners,

v.

WILLIAM D. SMITH.

ON WRIT OF CERTIORARI TO THE
FOURTH DISTRICT APPELLATE
COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

Whether a county jailer, as a defamation action plaintiff, is a "public official" for the purposes of that action, and therefore must plead and prove the federal constitutional burden of "actual malice" as opposed to mere negligence.

THE COPLEY PRESS, INC., THE STATE JOURNAL-REGISTER, JIM TINEN, STEVE SLACK, JOHN P. CLARKE, EDWARD H. ARMSTRONG, and PATRICK COBURN, Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Fourth District Appellate Court of Illinois, entered in the above entitled case on January 31, 1986.

In addition to the parties identified in the caption, the following additional Defendants have settled with the Plaintiff and are not participating in this appeal: The City of Springfield, Illinois, a municipal corporation, Detective James Dickerson, and Captain Frank Hoover.

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OPINIONS BELOW

The opinion of the Fourth District Appellate Court of Illinois is reported at 140 Ill. App. 3d 613,

488 N.E.2d 1032, 94 Ill. Dec. 785, and is printed in the Appendix hereto, page A-1. The judgment of the Circuit Court of Sangamon County, Illinois is contained in the docket entry printed in the Appendix, page A-8.

JURISDICTION

The judgment of the Fourth District Appellate Court of Illinois (Appendix, page A-1) was entered on January 31, 1986. A timely Affidavit of Intention to Appeal was filed on February 20, 1986, and a timely Petition for Leave to Appeal was filed in the Illinois Supreme Court on March 7, 1986. The Illinois Supreme Court denied the Petition for Leave to Appeal on June 3, 1986. The jurisdiction of the Supreme Court of the United States is invoked under the United States Constitution, art. 3, §2, cl. 2, and under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech, or of the press**; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (emphasis added).

This case involves Section One of the Fourteenth Amendment to the United States Constitution, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

STATEMENT OF THE CASE

On the evening of Sunday, January 22, 1978, two notorious federal prisoners, Raymond C. Milentz and Dennis Kirksey, attempted to escape from the Sangamon County Jail in Springfield, Illinois. The Plaintiff, William D. Smith, was on duty at the time in his capacity as jailer.

As a jailer, one of Plaintiff's duties, as delineated in the Sangamon County Police Department Duty Manual, and as testified to by the Plaintiff, was to frisk prisoners before they were admitted into the jail. Plaintiff had access to, and at times custody of, the keys used to lock prisoners into their cells. Plaintiff testified that occasionally he would carry the keys home with him and have to return to the jail to turn them in. Plaintiff had access to the keys used to lock and unlock doorways into and out of the jail. A jailer was required to make inspections of all jail cells to insure against escapes, including a count of all prisoners. The jailer was responsible to know where alarm

buttons were located to promote jail security. The jailer had access to a night stick to prevent escapes. It was a jailer's duty to take from a prisoner anything that could be used to harm the prisoner himself or other prisoners, or that could be used in an escape. As further delineated in the Police Department Duty Manual, a jailer had the duty to prevent escape of prisoners.

In the evening following the jailbreak, Springfield Police Commander Frank Hoover telephoned reporter Steve Slack of The State Journal-Register, a local, secular newspaper owned and operated by The Copley Press, Inc. Commander Frank Hoover was watch commander at the time of the jailbreak, and everyone on duty in the Police Department was under his control. He was also in charge of the investigation into the escape attempt. The Monday morning edition of The State Journal-Register contained the details of the escape attempt. The story was reported by staff writers Jim Tinen and Steve Slack. Frank Hoover gave Steve Slack the information, reported in the story the next day, which is complained of by the Plaintiff. Frank Hoover in deposition admitted he was the source of the story and that the story was accurate and complete based on his statement. The complained of information was that the Plaintiff was homosexually involved with one or both of the convicts, leading to the Plaintiff's alleged involvement in the escape, and that the Plaintiff allegedly gave a prisoner a ring in exchange for sexual favors, which ring was later found in one of the cells.

Petitioners raised the issue of their rights under the First Amendment to the United States Constitution by way of reference to, inter alia, this

Court's decision in **New York Times v. Sullivan**, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), in each of their motions to dismiss and for summary judgment, or in memoranda in support thereof. (R. Vol. 1, C13-17 (May 7, 1979 Motion to Dismiss Complaint and Action), C80-83 (November 13, 1979 Motion to Dismiss Amended Complaint and Action), C54-55 (April 7, 1980 Motion to Dismiss Second Amended Complaint and Action), C71-73 (November 6, 1980 letter to Honorable Richard J. Cadagin, Circuit Judge, with Arguments and Authorities), C148-149, C132-133 (January 28, 1983 Motion for Summary Judgment) C361-383 (February 26, 1985 Motion for Summary Judgment).) Petitioners raised the issue in the Appellate Court in their Appellees' Brief by reference to the First Amendment and this Court's decisions in **New York Times** and its progeny. The Fourth District Appellate Court held Plaintiff was not a public official by specific reference to **New York Times** and its progeny.

REASONS FOR GRANTING THE WRIT

I.
IMPORTANCE OF QUESTION

The Fourth District Appellate Court of Illinois has held that a jailer, whose job it is to ensure that state and federal convicts remain incarcerated, is not a public official and thus can maintain a libel action against a newspaper upon an allegation of mere negligence. With respect to public officials, the news media has a qualified right; that is, it is free to criticize official conduct, so long as it does

not act with actual malice. **New York Times v. Sullivan**, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 706 (1964). Actual malice means that the publication was made with knowledge of its falsity or with reckless disregard for the truth. Id. The court below has denied Defendants such right, and in so holding, the decision, unless reversed, could cast a chilling effect upon the constitutional guarantees of free speech and press as set forth in the United States Constitution. U.S. Const., Amend. I. Moreover, it has frustrated our national commitment to wide open, uninhibited, robust debate on the functions of government which was recognized as embodied in such constitutional guarantees by **New York Times**. 376 U.S. at 270. The Supreme Court of Tennessee has explained the import of **New York Times** as follows:

> . . . the news media have not only a right but a duty to make searching inquiry into all phases of official conduct and to realistically evaluate and assess the performance of duty by public officials. Only under the most compelling circumstances should the courts place obstacles in the way of the news media, or muzzle or deter their investigative efforts and reporting, even though the end result may be distasteful, despicable and shorn of all sense of fairness. The right of the news media to criticize official conduct is limited solely to their answerability for actual malice, which means that the publication was made with knowledge of its falsity or with reckless disregard for the truth. Any other standard would have a chilling effect upon one of the most cherished of all the freedoms specified in our bill of rights.

Press, Inc. v. Verran, 569 S.W.2d 435, 442 (1978).

In **Rosenblatt v. Baer**, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966), this Court held that the manager of a county recreation area was a public official, and stated: "It is clear, therefore, that the 'public official' designation applies **at the very least** to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." 383 U.S. at 85, 86 S. Ct. at 675, 15 L. Ed. 2d at 605. (emphasis added).

The statements complained of in this proceeding, contained in the newspaper account of the jailbreak, were obviously public discussion directed towards the performance of the office of jailer. It cannot be doubted that the abuse of such office, which is peculiarly governmental in nature, can have a great potentiality for social harm. As a result of the decision of the Fourth District Appellate Court of Illinois, prosecution under state libel laws is not only threatened, but has been sanctioned. Public discussion has necessarily been inhibited. The resulting chilling effect upon the Defendants is, under **New York Times** and its progeny, constitutionally prohibited.

II.

CONFLICT OF DECISIONS

Initially, it should be noted that the question presented is one of federal constitutional law, and does not have any basis in state law standards. This Court so held in **Rosenblatt v. Baer**, 383 U.S. 75, 84, 86 S. Ct. 669, 675, 15 L. Ed. 2d 597 (1966):

> Turning, then, to the question whether respondent was a "public official" within **New York Times**, we reject at the outset his suggestion that it should be answered by reference to state law standards. States have developed definitions of "public official" for local administrative purposes, not the purpose of a national constitutional protection. If existing state law standards reflect the purposes of **New York Times**, this is at best accidental. Our decision in **New York Times**, moreover, draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that "the constitutional limits of free expression in the Nation would vary with state lines." **Pennekamp v. Florida**, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L. Ed. 1295, 1298.

(footnotes omitted). Thus, any conflict between decisions of state courts is a conflict in interpretation of the Federal Constitution and the decisions of this Court, and can only be resolved by this Court.

There is substantial difference of opinion among state high courts and the Federal Courts of Appeal. This Court has previously recognized the potential for the conflict which now exists. In **Hutchinson v. Proxmire**, 443 U.S. 111, 119 n. 8, 99 S. Ct. 2675, 2680 n. 8, 61 L. Ed. 2d 411 (1979), this Court stated, "the Court has not provided precise boundaries for the category of "public official." This Court has previously declined opportunities to clarify the issue: "no precise lines need to be

drawn for the purposes of this case." **Rosenblatt**, 383 U.S. at 85, 86 S. Ct. at 675; and "we have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend. . ., or otherwise to specify categories of persons who would or would not be included." **New York Times v. Sullivan**, 376 U.S. 254, 283 n.23, 84 S. Ct. 710, 727 n.23, 11 L. Ed. 2d 686 (1964). The question presented herein does, however, present just such an opportunity.

This Court has stated that "the category of 'public official'. . . cannot be thought to include all public employees. . ." **Hutchinson v. Proxmire**, 443 U.S. at 119 n.8, 99 S. Ct. at 2680 n.8. Yet this Court has decided cases in which a variety of lower level public employees were found to be "public officials" for purposes of a defamation action. **Rosenblatt v. Baer** (recreation supervisor); **Beckley Newspapers Corp. v. Hanks**, 389 U.S. 81, 88 S. Ct. 197, 19 L. Ed. 2d 248 (1967) (county clerk); and **St. Amant v. Thompson**, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968) (deputy sheriff). Upon these cases and **New York Times**, which created the rule with respect to public officials, various state and federal courts have generated scores of public official decisions and have advanced a substantial number of inconsistent theories to support those decisions. The conflict of decisions has been noted by one commentator, who has said of **Rosenblatt**: "The general criteria of this decision, with the footnote qualifications imposed on them by the Court, have often, however, been grossly misinterpreted, inattentively ignored, or perfunctorily applied." David Elder, Defamation, Public Officialdom, and the **Rosenblatt v. Baer** Criteria —

A Proposal for Revivification: Two decades after **New York Times v. Sullivan**, 33 Buff. L. Rev. 579 (1984). The decisions below exemplify this conflict.

The Supreme Court of Tennessee held that a junior social worker in a county office of the State Department of Human Services is a public official. **Press, Inc. v. Verran**, 569 S.W.2d 435 (1978). After recognizing that "the Supreme Court of the United States has constitutionalized the law of libel, and in material particulars, has preempted state statutory and decisional law in cases and controversies involving the communications industry," 569 S.W.2d at 440, the Tennessee Court theorized that "involvement in public issues and controversies of interest to the public may be sufficient to trigger the constitutional privilege." 569 S.W.2d 441. The court held that "any position of [public] employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege." Id.

The foregoing decision creates a very broad definition of "public official" and is certainly one to which the District Court for the Southern District of New York was referring when it stated, "a large number of courts have disregarded the latter admonition [that public officials cannot be thought to include all public employees] and deemed countless individuals at the lowest echelons of government service to be 'public officials'." **Nelson v. Globe Intern, Inc.**, 626 F. Supp. 969 (1986). The New York District Court took a very different approach and advanced the theory that

public official designation rests on two underlying policies: first, the status of the defamed individual ("public officials are less in need of monetary recovery because they both assume the risk that they may be defamed and are more capable of negating the effects of defamatory statements." 626 F. Supp. at 975), and second, the content of the defamatory statement (. . ."protecting speech about 'public officials' should encourage debate about an issue of the highest importance in any democratic society, the operation of the government and the formulation of government policy." 626 F. Supp. at 974).

The question whether the New York District Court's rationale is better supported by the decisions of this Court seems to have been addressed by at least one state high court. The theory that a public official is more capable of negating the effects of defamatory statements due to his access to the press (the first policy rationale employed in **Nelson**, above) "is sufficiently flawed to justify the [United States Supreme] Court's reluctance to accord it great weight," according to the Washington Supreme Court. **Clawson v. Longview Pub. Co.**, 91 Wash. 2d 408, 580 P.2d 1223, 1227 (1979). The court was referring to this Court's decision in **Gertz v. Robert Welch, Inc.**, 418 U.S. 323, 344 n.9, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974), where the majority observed that "truth rarely catches up with a lie," and where the dissent noted that self-help is "too insubstantial a reed on which to rest a constitutional distinction." 418 U.S. at 363-64, 94 S. Ct. at 3018-19 (Brennan, J., Dissenting). Thus, in **Clawson**, the Washington Supreme Court chose a third distinct rationale and held that the administrator of a county motor

pool is a public official on the basis of "two pertinent variables: (1) the importance of the position held, and (2) the nexus between that position and the allegedly defamatory information — specifically, how closely the defamatory material bears upon fitness for office." 589 P.2d at 1228.

Finding that grand jurors are public officials, the Minnesota Supreme Court in **Standke v. B.E. Darby & Sons, Inc.**, 193 N.W.2d 139 (1971), conceded that such persons do not acquire their status voluntarily and have no easy access to the media. The Minnesota Court's position is therefore also at odds with those decisions which adopt the rationale that a public official is one who assumes the risk that he may be defamed.

The Illinois Supreme Court has its own theory. It has adopted a two prong test which is: (1) whether a government employee's duties are peculiarly governmental in character and (2) whether his duties are highly charged with the public interest or trust. **Coursey v. Greater Niles Township Publishing Corporation**, 40 Ill. 2d 257, 239 N.E.2d 837 (1968). In **Coursey**, the Illinois Court held a patrolman is a public official and stated: "The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws." 239 N.E.2d at 841.

The Supreme Court of South Carolina has a unique, rather ambiguous test. In **McLain v. Arnold**, 270 S.E.2d 124 (1980), the Court said:

> Simply speaking, the status of a public official may be deemed sufficient to warrant

> application of the **The New York Times** privilege, not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context.

270 S.E.2d at 125.

The Supreme Court of Missouri assumed, apparently without any rationale, that the manager of a community center is a public official, on the strength of this Court's decision in **Rosenblatt**, finding the manager of a county operated recreation area to be a public official. **Brown v. Kitterman**, 443 S.W.2d 146 (1969). Similarly, the Appellate Division of the Superior Court of New Jersey held that a director of a city parking authority is a public official based simply on the similarity of the Plaintiff's position to that of the Plaintiff in **Rosenblatt. Burke v. Deiner**, 190 N.J. Super. 382, 463 A.2d 963 (1983).

The Fourth Circuit Court of Appeals has stated that an individual need not be employed by the government, even on a contractual basis, to be a public official. **Jenoff v. Hearst Corp.**, 644 F.2d 1004, 1006 (1981). The Supreme Court of Oklahoma has also stated that a public official need not be a government employee, in finding that a former license tag agent was a public official. **Hodges v. Oklahoma Journal Pub. Co.** 617 P.2d 191 (1980). The court relied on its earlier decision in **Johnston v. Corinthian Television Corp.**, 583 P.2d 1101 (1978), finding a physical education teacher to be a public official, in which the court expressed yet another, distinct rationale and said:

> A person may become a public official within contemplation of the **New York Times** rule in either of two ways. First, as that case itself illustrates, he may be an elected official, and the alleged libel must relate to his official capacity. Second, as the Court held in **Rosenblatt v. Baer**, he may be a government employee with such responsibility that the public has an independent interest in his position and performance, and the alleged libel must relate to his official capacity.

The great confusion which the foregoing decisions exemplify is no doubt due to the fact that even low level public employees must expect a degree of public interest in the performance of their duties, as the Washington Supreme Court held in **Clawson**, in finding the plaintiff, who was in charge of a few employees who repaired and maintained county vehicles, a public official. Indeed, the plaintiff in **Rosenblatt**, cited above, was employed by a county to run a recreation area but was nevertheless found to be a public official by the United States Supreme Court. Even where a public employee's position is of the type which generally remains unnoticed, abuse of that position can lead to a controversy highly charged with public interest. Thus, the Alaska Supreme Court in **Green v. Northern Pub. Co.**, 655 P.2d 736 (1982), found a jail physician to be a public official when the death of an inmate led to public scrutiny of his performance. The court noted that:

> Dr. Green's position was not highly visible in the community and usually attracted little "public scrutiny." His position was of the

> type which generally remains unnoticed until something controversial occurs. In fact, the function of his unit and of Dr. Green himself did not come under critical public attention until the unfortunate death of an individual whose grave condition developed while under the unit's medical supervision. Thus, one could argue that Dr. Green's position did not invite public scrutiny "**entirely apart** from the scrutiny and discussion occasioned by the particular charges in controversy." **Rosenblatt v. Baer**, 383 U.S. at 86 n. 13, 86 S. Ct. at 676 n.13, 15 L. Ed. 2d at 606 n.13.

655 P.2d at 741. Nevertheless, the court believed there was some independent public interest in the doctor's position and stated: "The significance of this independent public interest is not lessened by the normally quiescent character of the public job." 655 P.2d at 741.

The court below relied on the "apparent importance" of the Plaintiff's government position. This decision, together with the conflicting rationales advanced by the Courts of Appeal and state high courts noted above, make this Court's consideration of this case both necessary and appropriate.

CONCLUSION

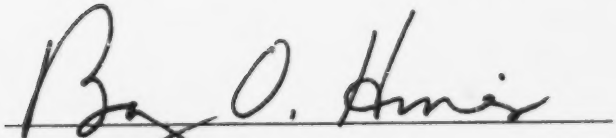
The position of the Plaintiff herein, as jailer, included the responsibility of preventing prisoner escapes. As such, a jailer's duties obviously place him in a position of public trust. The bare possibility of neglect or abuse of those duties necessarily invites, even demands, public scrutiny. It is therefore essential that the media not be denied their right to criticize Plaintiff's

conduct subject only to their answerability for actual malice. The question presented herein is an important one over which the Federal Courts of Appeal and state courts of last resort are in serious conflict, and the question requires resolution by this Court.

Wherefore, Petitioners respectfully pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Fourth District Appellate Court of Illinois in case No. 4-85-0388. In the event that the Petition is granted, Petitioners pray that the judgment of the court below be reversed, that the cause be remanded, and the court below be directed to dismiss the Plaintiff's Complaint as prayed for in the Petition.

Respectfully Submitted,

THE COPLEY PRESS, INC.,
THE STATE JOURNAL-REGISTER,
JIM TINEN, STEVE SLACK,
JOHN P. CLARKE, EDWARD H.
ARMSTRONG, and PATRICK COBURN,
Petitioners,



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APPENDIX

NO. 4—85—0388

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WILLIAM D. SMITH, Plaintiff-Appellant, v. COPLEY PRESS, INC., an Illinois Corporation, THE STATE JOURNAL-REGISTER, JIM TINEN, STEVE SLACK, JOHN P. CLARK, EDWARD H. ARMSTRONG, PATRICK COBURN, Defendants-Appellees, and THE CITY OF SPRINGFIELD, a municipal corporation, DETECTIVE JAMES DICKERSON, and CAPTAIN FRANK HOOVER, Defendants.	) Appeal from) Circuit Court) County of Sangamon) No. 4079)))))))) Honorable) R. J. Cadagin, and) J. S. Rhodes,) Judges Presiding.)))))

JUSTICE MORTHLAND delivered the opinion of the court:

The plaintiff appeals from entry of summary judgment for the defendants in a defamation action. We reverse.

The plaintiff, William D. Smith, worked as a jailer or "turnkey" at the Springfield police station. This facility was used to incarcerate both local offenders and Federal prisoners. When the

incidents giving rise to this litigation occurred, the plaintiff had been working as a jailer for approximately five months. As a jailer, the plaintiff was a civilian employee of the Springfield police department. Although he had a high school degree and had taken some courses in law enforcement administration at a junior college, there were no educational or training prerequisites to the jailer position. The plaintiff had access to keys which unlocked the cell doors and others within the jail facility. He carried no weapon, although he had access to a nightstick. The manual which details the jailer's duties indicates that the plaintiff had no authority to allow a person other than a police officer into the jail without prior authorization by a superior. The plaintiff was required to conduct periodic body counts of the prisoners, inventory and store valuables found on prisoners, and ensure that prisoners had been properly searched by the police officer who booked them. The jailer was also required to know where alarms were located within the jail and was to see that proper booking procedures were followed.

On the night of January 22-23, 1978, while the plaintiff was on duty, two Federal prisoners attempted to escape. The prisoners sawed through bars on one door within the jail and appeared in a front room where the plaintiff and another jailer were on duty. The plaintiff and his fellow jailer grappled with the escaping prisoners and within a short time, police arrived and returned the prisoners to their cells.

The January 23, 1978, morning edition of the State Journal-Register, a newspaper owned and operated by defendant Copley Press, Inc., contained a front-page story detailing the escape

attempt. The article reported that the plaintiff and his fellow jailer were treated for injuries and that the plaintiff and a third jailer, Karl E. Kaylor, had been arrested on charges of aiding the escape attempt. The article paraphrased the Springfield Police chief as stating that he "would not be able to say how or why the jailers aided the prisoners until investigations were complete." The article then continued:

> "According to a police source, Smith was homosexually involved with one or both of the convicts, leading to his alleged involvement in the escape.
>
> The source also said Smith owned a black onyx ring, which allegedly was given to one of the prisoners in return for sexual favors. The ring was later found in one of the cells."

Subsequently, officials apparently determined that the escaping prisoners had used materials smuggled into their cells by a girlfriend of one of the escapers during Mr. Kaylor's shift at the jail. A grand jury refused to indict the plaintiff for his alleged involvement in the escape attempt. Nevertheless, the plaintiff did not return to work with the police department after January 23, 1978.

On January 22, 1979, the plaintiff filed suit in Sangamon County circuit court alleging that the paragraphs from the article, quoted above, had libeled him. Included as defendants were the State Journal-Register's parent company, Copley Press, the newspaper's reporters and editors, the city of Springfield, and two Springfield policemen, detective James Dickerson and captain Frank Hoover. Only the newspaper defendants remain at this juncture.

Counts I and III pertain to the newspaper defendants. Count I alleged that the newspaper defendants knew or should have known that the article's statements concerning the plaintiff's alleged homosexual activity were false and that these defendants did not believe in the truth of the assertedly libelous statements. Count III alleged that the newspaper defendants either failed to exercise reasonable care in determining the truth of their statements concerning the plaintiff or lacked reasonable grounds for their belief that these statements were true. Under count I, the plaintiff also alleged that the article was published with reckless disregard of the truth.

The unnamed police source referred to in the allegedly libelous statements was identified in depositions as captain Frank Hoover, the highest ranking police official on duty during the escape. On February 26, 1985, the newspaper defendants filed a motion for summary judgment. In their motion the defendants argued that the plaintiff was a "public official" within the meaning of the **New York Times** rule. (**New York Times Co. v. Sullivan** (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.) They further claimed that since the source of the allegedly defamatory material in the article was a high ranking police official who believed his statements concerning the plaintiff to be true, and since the reporter relied on his source in good faith, no issue of fact concerning the existence of the "actual malice" required by **New York Times** existed.

On May 8, 1985, the circuit court granted the motion for summary judgment against the plaintiff.

The plaintiff appeals, contending that if he is deemed a "public official," his count I and the record sufficiently present a factual issue as to

whether the newspaper defendants acted with "actual malice." The plaintiff also seeks to reverse the trial court's determination that count III, the claim under a negligence theory, was inadequate due to the plaintiff's "public official" status.

In 1964, the United States Supreme Court limited the scope of defamation laws to bring them in line with the goals of the free speech clause of the first amendment. The high court determined that:

> "The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." **New York Times Co. v. Sullivan** (1964), 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.

The Supreme Court subsequently extended this "actual malice" standard to "public figures" as well as public officials. **(Curtis Publishing Co. v. Butts** (1967), 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975.) None of the parties in the instant case contend that the plaintiff is a "public figure." Indeed, the defendants' motion for summary judgment was premised upon the plaintiff being a public official.

The United States Supreme Court further defined the term "public official" in **Rosenblatt v. Baer** (1966), 383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669. The **Rosenblatt** Court determined that "'the public official' designation applies at the very least

to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." (383 U.S. 75, 85, 15 L. Ed. 2d 597, 605, 86 S. Ct. 669, 676). Nevertheless, the Supreme Court cautioned that the "public official" characterization, with the attendant application of the **New York Times** malice standards, should be reserved for those positions in government in which "the public has [an] independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees ***." 383 U.S. 75, 86, 15 L. Ed. 2d 597, 606, 86 S. Ct. 669, 676.

The defendants argue that the plaintiff, as a jailer, is indistinguishable from a police officer. Police officers, of whatever rank, are unquestionably "public officials" in Illinois. **(Coursey v. Greater Niles Township Publishing Corp.** (1968), 40 Ill. 2d 257, 239 N.E.2d 837.) The plaintiff counters that because of the lack of training or education required for the jailer position, the utter lack of authority over other employees or members of the public, and the total lack of discretion accorded him in performing his duties as jailer, he should not be considered a public official.

In our view, the plaintiff performed different duties and possessed significantly less authority than does a police officer, of whatever rank. His status as a "public official" is, therefore, not controlled by the **Coursey** case. The appellate court's statement concerning a public school principal in **McCutcheon v. Moran** (1981), 99 Ill. App. 3d 421, 425 N.E.2d 1130, is equally applicable to the plaintiff in this case. In **McCutcheon**, the appellate court noted

that, "[i]mplicit in the reasoning of **New York Times Co. v. Sullivan** is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government." (99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133.) The **McCutcheon** court termed the relationship a public school principal has to the conduct of government "too remote" to open such an individual to a qualifiedly privileged assault on their reputation. Likewise, the plaintiff here had no authority to control the workings of his government employer. Even conceding that abuse of the jailer position may affect the public interest, we cannot say that the plaintiff held a position of such apparent importance that the public had an independent interest in his qualifications and performance beyond the usual public interest in the qualifications and performance of any government employee.

We hold that the plaintiff was not a "public official" during the events which led to this lawsuit for purposes of the **New York Times** malice standards. Accordingly, we reverse the judgment of the circuit court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

WEBBER and SPITZ, JJ., concur.

WILLIAM SMITH

vs.

THE STATE JOURNAL REGISTER, ET AL.

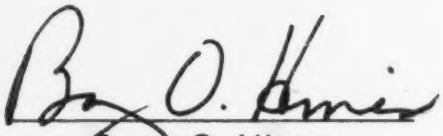
40-79 (SMITH VS. STATE-JOURNAL REGISTER, ET AL.)
RJC/djc
3/31/83 DE
Defendant's Motion for Summary Judgment allowed.
Cause dismissed. Cause stricken.

CERTIFICATE OF SERVICE

The undersigned, Barry O. Hines, Counsel for Petitioners, THE COPLEY PRESS, INC., THE STATE JOURNAL-REGISTER, JIM TINEN, STEVE SLACK, JOHN P. CLARKE, EDWARD H. ARMSTRONG, and PATRICK COBURN, hereby certifies that pursuant to Supreme Court Rule 28.3 he has served three (3) copies of the foregoing Petition for Writ of Certiorari upon:

Jeffrey B. Levens
Sturm & Levens
308 East Canedy Street
Springfield, Illinois 62703

Service was accomplished by depositing said copies, with postage fully prepaid, in a U.S. Post Office Mail Box in Springfield, Illinois, on the 29th day of August, A.D. 1986.



Barry O. Hines

(2)

No. 86-412

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE COPLEY PRESS, INC.,
THE STATE JOURNAL-REGISTER,
JIM TINEN, STEVE SLACK,
JOHN P. CLARKE, EDWARD H. ARMSTRONG,
and PATRICK COBURN, Petitioners,

v.

WILLIAM D. SMITH.

ON WRIT OF CERTIORARI TO THE
FOURTH DISTRICT APPELLATE
COURT OF ILLINOIS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jeffrey B. Levens
Counsel for Respondent
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23 pp

QUESTION PRESENTED

Whether a city jailer should be considered a "public official" thereby requiring that he plead and prove actual malice, rather than negligence, to sustain a defamation action.

WILLIAM D. SMITH, Respondent herein, prays that Petitioner's request for a Writ of Certiorari be denied, and that the judgement of the Fourth District Appellate Court of Illinois, entered in the above-named cause on January 31, 1986, be not disturbed.

In addition to the parties identified in the caption, the following additional Defendants have settled with the Plaintiff and are not participating in this appeal: The City of Springfield, Illinois, a municipal corporation, Detective James Dickerson, and Captain Frank Hoover.

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Meiners v. Moriarty, 563 F.2d 343, (7th Cir. 1977). 8

New York Times v. Sullivan., 376 U.S 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). 7

Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966). 7, 9

Smith v. Copely Press Inc., 140 Ill. App. 3d 613, 94 Ill. Dec. 785, 488 N.E. 2d 1032 (4th Dist. 1985). 9

OPINIONS BELOW

The opinion of the Fourth District Appellate Court of Illinois is reported at 140 Ill. App. 3d 613,

488 N.E.2d 1032, 94 Ill. Dec. 785, and is printed in the Appendix hereto, page A-1. The judgment of the Circuit Court of Sangamon County, Illinois is contained in the docket entry printed in the Appendix, page A-8.

JURISDICTION

The judgment of the Fourth District Appellate Court of Illinois (Appendix, page A-1) was entered on January 31, 1986. A timely Affidavit of Intention to Appeal was filed on February 20, 1986, and a timely Petition for Leave to Appeal was filed in the Illinois Supreme Court on March 7, 1986. The Illinois Supreme Court denied the Petition for Leave to Appeal on June 3, 1986. The jurisdiction of the Supreme Court of the United States is invoked under the United States Constitution, art. 3, §2, cl. 2, and under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech, or of the press**; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances. (emphasis added).

This case involves Section One of the Fourteenth Amendment to the United States Constitution, which provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

STATEMENT OF THE CASE

On the evening of January 22, 1978, William D. Smith, 25 years old, arrived at the Springfield Police Station, to begin his 8-hour shift as jailer. Although later permanently closed, the jail was then used to incarcerate not only local offenders, but some federal prisoners as well. That evening, the jail was housing two notorious criminals, who had recently been recaptured after having escaped from a federal penitentiary in Missouri.

Smith had a high school degree, and had taken some law enforcement administration courses on the junior college level. Married and the father of two daughters, he had begun working as jailer only 6 months prior to this incident.

Smith had been hired out of an employment agency, and was paid $550 per month to know where the alarms were, book in prisoners, and allow them a phone call. He had access to keys, but did not control them. He had no authority to prohibit a police officer's entry to the cells, and could allow access by any others given clearance by the desk sergeant.

Smith's primary purpose appears to have been to remove shoelaces and belts so inmates could not hang themselves. If there was a fight in a cell, he could not even enter himself, but had to call the desk sergeant. He did not have a weapon, but had access to a nightstick.

That evening, the two prisoners slipped out of their cells, attacked Smith and another jailer, and attempted to escape. They were overpowered and returned to their cells without ever having even made it out of the jail area. The department conducted an immediate investigation, as a result of which Smith was relieved of his duties, treated for his injuries, questioned extensively, and arrested.

The next morning's addition of the State Journal-Register, a newspaper owned and operated by the Petitioner, Copley Press, Inc., detailed the escape attempt in its headline story. The article paraphrased the police chief as having said he "would not be able to say how or why the jailers aided the prisoners until investigations were complete." However, rather than dropping the issue at that point, the article continued:

> According to a police source, Smith was homosexually involved with one or both of the convicts, leading to his alleged involvement in the escape.
>
> The source also said Smith owned a black onyx ring which allegedly was given to one of the prisoners in return for sexual favors. The ring was later found in one of the cells.

A few days later, it was learned that Smith had nothing to do with the jailbreak, but that hacksaw blades had been smuggled into the cellblock by a girlfriend of one of the inmates. The newspaper

never retracted those aspects of its story which applied to Smith, and he never worked at the police station again, after that night.

REASONS FOR DENYING THE WRIT

I

THE TERMS "PUBLIC OFFICIAL" AND "GOVERNMENT EMPLOYEE" ARE NOT SYNONYMOUS. DETERMINING THE DISTINCTION IS THE RESPONSIBILITY OF THE TRIER OF FACT, BASED ON THE UNIQUE CIRCUMSTANCES OF EACH CASE.

In **Rosenblatt v. Baer**, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966), this Court held:

> The thrust of **New York Times** is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the **New York Times** malice standards apply.

Applying this standard, Smith cannot be shown to have been one whose qualifications and performance were of greater-than-average interest to the public. He was hired out of an employment agency, and paid a gross salary of $550 per month. There were no training or educational requirements; he had no decision-making responsibilities whatsoever. By holding him to have been a public official, the trial court essentially equated "public

official" with "government employee." If Smith can be held to be a public official, then so can virtually anyone on a public payroll. This was **not** the design of this court.

In **Meiners v. Moriarity**, 563 F.2d 343 (7th Cir. 1977), drug enforcement agents for the Department of Justice were found to have been public officials, to whom the actual malice standard applied. They protested, asserting that to define them as public officials would be to make the term synonymous with "government employee." Although the court disagreed, finding the agents had the power to "directly and personaliy effect individual freedom," the "government employee" assertion was taken to task: The terms should **not** be synonymous. 563 F.2d at 352:

> We need not fear, as the Defendants contend, that holding them to be public officials will make the terms "public official" and "government employee" synonymous. Each case will have to be decided on its own facts, and here the trial court did not err in holding Defendants to be public officials.

With recognition that "public official" and "government employee" are not synonymous comes the task of deciding where the line should be drawn. The definitive guideline for almost 2 decades has been **Coursey v. Greater Niles Township Publishing Corp.**, 40 Ill.2d 257, 239 N.E.2d 837, 841 (1968), where a patrolman was found to have been a public official. He was expressly found to have been "the lowest in rank of police officials." Obviously, the Illinois Supreme Court meant to "draw the line" at the level of patrolman.

Applying **Coursey**, the appellate court refused to lower the line in this instance, agreeing with Smith that "because of the lack of training or education required for the jailer position, the utter lack of authority over other employees or members of the public, and the total lack of discretion accorded him in performing his duties as jailer, he should not be considered a public official." **Smith v. Copley Press, Inc.**, A-6. Applying **Rosenblatt**, Smith's position was found not to have been "of such apparent importance that the public had an independent interest in his qualifications and performance beyond the usual public interest in the qualifications and performance of any government employee." A-7.

The public could not have possibly cared less. Smith was a housekeeper, of so little import that even with his having been rendered helpless by the escaping inmates, they **still** never made it out of the cell area. His title, role and duties were as nebulous as could be. Thus rules the Illinois appellate court in this instance, without dissent.

II

THE ILLINOIS SUPREME COURT ESTABLISHED THE DEFINITIVE GUIDELINES FOR DETERMINING WHO SHOULD BE CONSIDERED A "PUBLIC OFFICIAL." THERE IS NO NEED TO ALTER THE FORMULA IN THIS INSTANCE.

Petitioner's alleged conflict of decisions is insignificant, where definitive, universal guidelines have been established for determining who is a "public official." There is no need to alter the formula in this instance.

In **Coursey v. Greater Niles Township Publishing Corp.**, 40 Ill.2d 257, 239 N.E.2d 837, 841 (1968), the Illinois Surpreme Court established an instructive rather than dictatorial approach to determining what professions fall in the "public official" category. This has been the key to its timeless applicability.

Coursey, as well as hundreds of decisions which have followed its lead, comprise a grand network of rulings which could never have survived so long were **Coursey** to have been overly restrictive. Courts throughout the nation have followed its lead, applying its parameters to the unique circumstances of each given case. The abundance of case law belies Petitioner's assertion that a chilling affect will result, if its petition for certiorari is denied. Indeed, it has not even taught Petitioner to tread carefully where it has the power to humiliate.

In this instance, Smith was a mere turnkey, obviously without the power to have affected a successful jailbreak, even if he wanted to do so. His role did not affect the life, liberty, money or property of anyone, and he had no power to enhance or disrupt anyone's enjoyment of life, peace or tranquility. He was so low in the hierarchy of government employees he had no responsibility whatsoever for, or control over, police affairs. He was as close to a non-entity as a person could be.

Petitioner argues a jailer is a public official because his job is important, and there is a strong public interest in maintaining a city jail's security. The public has an interest in the free flow of sewage as well; but Petitioner has yet to cite a case in which a street department employee is considered a public official. A distinction must be made, for First Amendment purposes, between

low-ranking governmental employees performing ministerial functions to support their families, and high-ranking officials who perform discretionary acts in furtherance of the affairs of government, or who have substantial responsibility for, or control over, the conduct of such affairs.

The Illinois Appellate Court has made this distinction. Respondent respectfully submits it should be acceptable to this Court, and be allowed to stand.

CONCLUSION

In conclusion, the Illinois appellate court properly refused to extend the parameters of **Coursey** to apply to a lowly turnkey, hired out of an employment agency to work the nightshift, whose most important job duty appears to have been not to get caught napping. Not by any stretch of the imagination should he be considered a public official. **Coursey** has proven to be flexible and instructive. Imposition of restrictions upon this standard could cause more harm by failing than benefit by succeeding.

Respectfully submitted,

STURM & LEVENS, Attorneys for
Plaintiff, William D. Smith,

Jeffrey B. Levens

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APPENDIX

NO. 4—85—0388

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WILLIAM D. SMITH, Plaintiff-Appellant, v. COPLEY PRESS, INC., an Illinois Corporation, THE STATE JOURNAL-REGISTER, JIM TINEN, STEVE SLACK, JOHN P. CLARK, EDWARD H. ARMSTRONG, PATRICK COBURN, Defendants-Appellees, and THE CITY OF SPRINGFIELD, a municipal corporation, DETECTIVE JAMES DICKERSON, and CAPTAIN FRANK HOOVER, Defendants.	) Appeal from) Circuit Court) County of Sangamon) No. 4079)))))))) Honorable) R. J. Cadagin, and) J. S. Rhodes,) Judges Presiding.)))))

JUSTICE MORTHLAND delivered the opinion of the court:

The plaintiff appeals from entry of summary judgment for the defendants in a defamation action. We reverse.

The plaintiff, William D. Smith, worked as a jailer or "turnkey" at the Springfield police station. This facility was used to incarcerate both local offenders and Federal prisoners. When the

incidents giving rise to this litigation occurred, the plaintiff had been working as a jailer for approximately five months. As a jailer, the plaintiff was a civilian employee of the Springfield police department. Although he had a high school degree and had taken some courses in law enforcement administration at a junior college, there were no educational or training prerequisites to the jailer position. The plaintiff had access to keys which unlocked the cell doors and others within the jail facility. He carried no weapon, although he had access to a nightstick. The manual which details the jailer's duties indicates that the plaintiff had no authority to allow a person other than a police officer into the jail without prior authorization by a superior. The plaintiff was required to conduct periodic body counts of the prisoners, inventory and store valuables found on prisoners, and ensure that prisoners had been properly searched by the police officer who booked them. The jailer was also required to know where alarms were located within the jail and was to see that proper booking procedures were followed.

On the night of January 22-23, 1978, while the plaintiff was on duty, two Federal prisoners attempted to escape. The prisoners sawed through bars on one door within the jail and appeared in a front room where the plaintiff and another jailer were on duty. The plaintiff and his fellow jailer grappled with the escaping prisoners and within a short time, police arrived and returned the prisoners to their cells.

The January 23, 1978, morning edition of the State Journal-Register, a newspaper owned and operated by defendant Copley Press, Inc., contained a front-page story detailing the escape

attempt. The article reported that the plaintiff and his fellow jailer were treated for injuries and that the plaintiff and a third jailer, Karl E. Kaylor, had been arrested on charges of aiding the escape attempt. The article paraphrased the Springfield Police chief as stating that he "would not be able to say how or why the jailers aided the prisoners until investigations were complete." The article then continued:

> "According to a police source, Smith was homosexually involved with one or both of the convicts, leading to his alleged involvement in the escape.
>
> The source also said Smith owned a black onyx ring, which allegedly was given to one of the prisoners in return for sexual favors. The ring was later found in one of the cells."

Subsequently, officials apparently determined that the escaping prisoners had used materials smuggled into their cells by a girlfriend of one of the escapers during Mr. Kaylor's shift at the jail. A grand jury refused to indict the plaintiff for his alleged involvement in the escape attempt. Nevertheless, the plaintiff did not return to work with the police department after January 23, 1978.

On January 22, 1979, the plaintiff filed suit in Sangamon County circuit court alleging that the paragraphs from the article, quoted above, had libeled him. Included as defendants were the State Journal-Register's parent company, Copley Press, the newspaper's reporters and editors, the city of Springfield, and two Springfield policemen, detective James Dickerson and captain Frank Hoover. Only the newspaper defendants remain at this juncture.

Counts I and III pertain to the newspaper defendants. Count I alleged that the newspaper defendants knew or should have known that the article's statements concerning the plaintiff's alleged homosexual activity were false and that these defendants did not believe in the truth of the assertedly libelous statements. Count III alleged that the newspaper defendants either failed to exercise reasonable care in determining the truth of their statements concerning the plaintiff or lacked reasonable grounds for their belief that these statements were true. Under count I, the plaintiff also alleged that the article was published with reckless disregard of the truth.

The unnamed police source referred to in the allegedly libelous statements was identified in depositions as captain Frank Hoover, the highest ranking police official on duty during the escape. On February 26, 1985, the newspaper defendants filed a motion for summary judgment. In their motion the defendants argued that the plaintiff was a "public official" within the meaning of the **New York Times** rule. (**New York Times Co. v. Sullivan** (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710.) They further claimed that since the source of the allegedly defamatory material in the article was a high ranking police official who believed his statements concerning the plaintiff to be true, and since the reporter relied on his source in good faith, no issue of fact concerning the existence of the "actual malice" required by **New York Times** existed.

On May 8, 1985, the circuit court granted the motion for summary judgment against the plaintiff.

The plaintiff appeals, contending that if he is deemed a "public official," his count I and the record sufficiently present a factual issue as to

whether the newspaper defendants acted with "actual malice." The plaintiff also seeks to reverse the trial court's determination that count III, the claim under a negligence theory, was inadequate due to the plaintiff's "public official" status.

In 1964, the United States Supreme Court limited the scope of defamation laws to bring them in line with the goals of the free speech clause of the first amendment. The high court determined that:

> "The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." **New York Times Co. v. Sullivan** (1964), 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.

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The defendants argue that the plaintiff, as a jailer, is indistinguishable from a police officer. Police officers, of whatever rank, are unquestionably "public officials" in Illinois. **(Coursey v. Greater Niles Township Publishing Corp.** (1968), 40 Ill. 2d 257, 239 N.E.2d 837.) The plaintiff counters that because of the lack of training or education required for the jailer position, the utter lack of authority over other employees or members of the public, and the total lack of discretion accorded him in performing his duties as jailer, he should not be considered a public official.

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We hold that the plaintiff was not a "public official" during the events which led to this lawsuit for purposes of the **New York Times** malice standards. Accordingly, we reverse the judgment of the circuit court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

WEBBER and SPITZ, JJ., concur.

WILLIAM SMITH

vs.

THE STATE JOURNAL REGISTER, ET AL.

40-79 (SMITH VS. STATE-JOURNAL REGISTER, ET AL.)
RJC/djc
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Cause dismissed. Cause stricken.

CERTIFICATE OF SERVICE

The undersigned, Jeffrey B. Levens, Counsel for Respondent, WILLIAM D. SMITH, hereby certifies that pursuant to Supreme Court Rule 28.3 he has served three (3) copies of the foregoing Petition for Writ of Certiorari upon:

BARRY O. HINES
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_____

Jeffrey B. Levens